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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 214

JOSEPH A. DAUGHERTY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

EDWARD T. MANCUSO,
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PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Joseph A. Daugherty for a writ of certiorari to the Supreme Court of the State of California, to review a judgment of that Court

affirming a judgment of the Superior Court of the State of California, in and for the County of Sonoma, imposing the death penalty upon petitioner, following his conviction by a jury of the crime of murder of the first degree, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The Grand Jury of Sonoma County, California, on March 19, 1952, presented an indictment charging, in substance, that on or about the 28th day of February 1952, in the County of Sonoma, State of California, the petitioner willfully, unlawfully and feloniously and with malice aforethought murdered one Florena Daugherty, a human being, contrary to the form, force and effect of the statute, etc. (Typewritten Transcript, page 1.)

On April 4, 1952 petitioner entered the pleas of "not guilty" and "not guilty by reason of insanity" to the indictment. (Typewritten Clerk's Transcript, page 77.)

Section 1016 of the Penal Code of the State of California (Bender-Moss Company, San Francisco, 1951) reads:

> "There are five kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court:
>
> 1. Guilty.
>
> 2. Not guilty.
>
> 3. A former judgment of conviction or acquittal of the offense charged.
>
> 4. Once in jeopardy.

5. Not guilty by reason of insanity.

"A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be **conclusively presumed** to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty thereby admits the commission of the offence charged."

Section 1026 of the Penal Code, so far as pertinent, provides:

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas, only, **and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.** If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If

> the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminal insane, or if there be no such state hospital, then that he be confined in some other state hospital for the insane."*

The petitioner was tried in accordance with the provisions of these statutes, the same jury trying each of the pleas. (Typewritten Clerk's Trans., pages 80, 118, 119.)

Although there are actually two trials under this procedure, and though the trial on the issue of insanity may be before a different jury, the California Courts have held, in the face of the fact, that there is but one trial.

People v. Wells, 33 Cal. (2d) 330, 202 Pac. (2d) 53;

People v. Perry, 99 Cal. App. 90, 277 Pac. 1080;

People v. Troche, 206 Cal. 35, 273, Pac. 767;

People v. Foster, 3 Cal. App. (2d) 35, 39 Pac. (2d) 271.

At the first trial, or, under the foregoing construction of the statute, the **first phase** of the **one** trial, there was testimony given by two physicians, one of whom, Clifford M. Carson, a member of the

*The additional provisions of the statute dealing with the subsequent disposition of the prisoner are omitted in the interest of brevity.

Lunacy Commission for Sonoma County, and who was a witness for both prosecution and defense, testified that on the day when petitioner was accused of murdering his wife he did not have the mental capacity to form the intent to commit the crime of first degree murder. (Typewritten Transcript, page 1019.) Another alienist, called by the prosecution, testified that in his opinion the accused was in a state in which he was unable to distinguish between right and wrong, or to appreciate the possible consequences of his acts. (T.R., page 1058.)

On the *voir dire* of the first juror the District Attorney stated:

> "Q. I might also point this out to you: that during the first phase of the trial, as I have explained it to you, the defendant here is **conclusively presumed to be sane.** The matter of his sanity is not for consideration during the first phase of the trial; that only comes into play during the second phase of the trial. During the second phase of the trial he is presumed to be sane, just as the law presumes everyone to be sane until you are convinced otherwise. Do I make myself clear?
>
> "A. That's right.
>
> "Q. And would you if chosen as a juror follow the instructions of the Court along those lines?
>
> "A. Yes." (Typewritten Transcript, Volume I, page 14.)

Similar questions were asked of other members of the panel, but in the interest of brevity we quote but one other instance:

"Q. Well, the first phase of the trial, as you probably gathered from being present in Court, will be devoted exclusively to the question of guilt or innocence of the defendant without regard to his mental condition as far as legal sanity is concerned. And during that first phase, as mentioned before, the defendant is conclusively presumed to be sane. And during that first phase, do you feel you could put aside completely any thoughts you might have regarding his sanity or insanity?

"A. Yes, I could." (Typewritten Transcript, page 205.)

At the conclusion of the first phase of this bifurcated trial, the trial judge said in his charge to the jury:

"A person may be legally sane, as we define that term in dealing with the question of criminal responsibility, and, as stated in this phase of the trial, **the defendant is conclusively presumed to be legally sane,** and yet may be in an abnormal mental, nervous or physical condition." (T.R., page 1259.)

The jury by its verdict found the defendant guilty of murder in the first degree, making no recommendation as to the punishment. (Clerk's Typewritten Transcript, page 27.)

Under the decisions of the Supreme Court of the State of California such a verdict made the imposition of the death penalty mandatory. (*People v. Bollinger,* 196 Cal. 191, 237 Pac. 25; *People v. LaVerne,* 212 Cal. 29, 297 Pac. 561; *People v. Hall,* 199 Cal. 451, 249 Pac. 859.)

The so-called "second phase" of the trial was then held before the same jury at the conclusion of which the jury found a verdict that the defendant was sane at the time of the commission of the offense charged in the indictment. (Typewritten Transcript, page 41.)

A motion of the defendant for a new trial was denied as was a motion for a trial to determine the present sanity of the defendant, and judgment of death was pronounced. (Clerk's Transcript, page 132.)

The law of the State of California provides for an automatic appeal to the Supreme Court of that state in all cases in which judgment of death has been rendered. (California Penal Code, Section 1239.)

On that appeal in the instant case, petitioner raised two Federal questions:

1. The provisions of Sections 1016 and 1026 of the Penal Code of this State relative to the defense of insanity, and the procedure when the accused pleads that he was insane at the time of the commission of the offense, are unconstitutional and void, and constitute a deprivation of due process of law within the meaning of the Fourteenth Amendment.

2. The statute of the State of California (Penal Code of California, Section 3604) which provides that "the punishment of death shall be inflicted by the administration of A lethal gas", is unconstitutional and void for uncertainty, and permits the imposition of cruel and unusual punishments in violation of the prohibition of the same by the Constitution of the United States

which is protected from state invasion by the Fourteenth Amendment.

In its opinion affirming the judgment of the Superior Court (*People v. Daugherty*, 40 Advance California Reports 910, 256 Pac. (2d) .....), the Supreme Court of California (Typewritten Record, Volume VI, page 1703) dismisses the first contention in a single paragraph:

> "Defendant contends that sections 1016 and 1026 of the Penal Code, providing for a double plea of not guilty and not guilty by reason of insanity and a bifurcated trial on the issues, violate the due process clauses of the Constitutions of the United States and the State of California and that the cases beginning with *People v. Troche*, 206 Cal. 35 and *People v. Leong Fook*, 206 Cal. 64, to the contrary should be overruled. (See also *In re Slayback*, 209 Cal. 480; *People v. Dias*, 210 Cal. 495; *People v. D'Angelo*, 13 Cal. 2d 203; *People v. Cordova*, 14 Cal. 2d 308; *People v. Ming*, 27 Cal. 2d 443; *People v. Wells*, 33 Cal. 2d 330.) We see no occasion for reconsidering our decisions in those cases. No new grounds are advanced."

The second contention is dealt with at considerably greater length:

> "Section 3604 of the Penal Code provides that punishment of death shall be inflicted by the administration of 'a lethal gas.' Defendant contends that the provision is invalid because of uncertainty in that it permits the imposition of cruel and unusual punishment contrary to the Federal Constitution in that the executioner could

use a lethal gas which would cause long and cruel suffering. It is doubtful that this question is properly raised on this appeal since ordinarily we are not concerned with the execution of the judgment and there is no showing that such a gas has ever been used or will be used in this case. In any event, the contention is satisfactorily answered in *State v. Gee Jon* (Nev.), 211 Pac. 676, where similar contentions and a similar statute were involved."

The Court then quotes at length from the Nevada case, in which it is said, *inter alia:*

"That suffering and torture may be inflicted by its administration is no argument against it. We must presume that the officials intrusted with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they may not do so is no argument against the law."

A petition for a rehearing, in which the said Federal questions were again raised, was denied without opinion by the State Supreme Court on May 28th, 1953. (Typewritten Transcript, Volume VI, page 1719.)

STATEMENT PARTICULARLY DISCLOSING THAT BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

(a) The statutory provision believed to sustain the jurisdiction is Title 28, United States Code, Section 1257, Paragraph (3).

(b) The date of the judgment of the trial Court—June 19, 1952. The date of the judgment of the Supreme Court of the State of California sought to be reviewed—May 5, 1953—rehearing denied May 28, 1953. (Clerk's Transcript, page 132; Transcript of Record, Volume VI, pages 1718, 1719.)

(c) That the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, is sufficiently set forth in the preceding summary statement of the matter involved, and from the above quoted language of the Supreme Court of the State of California, in which it decided the Federal questions adversely to the contentions of petitioner.

(d) The cases believed to sustain the jurisdiction are in part as follows:

Keerl v. Montana, 213 U.S. 135, 29 S. Ct. 469, 53 L. ed. 634 (where the plea of once in jeopardy was held to present a federal question);

Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 241, 17 S. Ct. 581, 41 L. ed. 979, 986;

Herbert v. Louisiana, 272 U.S. 312, 316, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 A.L.R. 1102;

Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A.L.R. 406 (a convic-

tion procured by perjured testimony violates due process);

Moore v. Dempsey, 261 U.S. 86, 67 L. ed. 543, 43 S. Ct. 265 (a conviction procured by threat of mob violence);

Tumey v. Ohio, 273 U.S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243 (trial before a judge having a financial interest in the outcome is void for want of due process);

Holden v. Hardy, 169 U.S. 366, 389, 42 L. ed. 780, 18 S. Ct. 383;

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 84 A.L.R. 527 (deprivation of right to counsel);

Brown v. Mississippi, 274 U.S. 278, 80 L. ed. 682 (conviction void because confessions were obtained by torture);

Snyder v. Massachusetts, 291 U.S. 97, 105, 78 L. ed. 674, 54 S. Ct. 330, 90 A.L.R. 575;

Saunders v. Shaw, 244 U.S. 317, 61 L. ed. 1163, 37 S. Ct. 638;

Morrison v. California, 291 U.S. 82, 54 S. Ct. 281, 78 L. ed. 664 (holding void for want of due process; a statute requiring the accused to prove citizenship in a prosecution against an alleged alien for holding land);

Lanzetta v. New Jersey, 306 U.S. 454, 59 S. Ct. 618, 83 L. ed. 888 (holding violative of due process a conviction under statute void for uncertainty);

Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672, 91 L. ed. 1903, 171 A.L.R. 1223, and de-

cisions cited in the dissenting opinion of Mr. Justice Black;

Phyle v. Duffy, 334 U.S. 431, 68 S. Ct. 1131, 92 L. ed. 1494;

Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. ed. 183, 25 A.L.R. (2d) 1396.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

(1) "What has been said previously indicates the gravity of the questions here raised under the due process clause as heretofore construed by this Court, both the contention that execution of an insane man is offensive to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, *Adamson v. California,* 332 U.S. 46, 9 L. ed. 1903, 67 S. Ct. 1672, 171 A.L.R. 1223, *Carter v. Illinois,* 392 U.S. 173, 91 L. ed. 172, 67 S. Ct. 216, and the different contention that life shall not be taken by a state as the result of the unreviewable *ex parte* determination of a crucial fact made by a single executive officer. See *Ng Fung Ho v. White,* 259 U.S. 276, 66 L. ed. 938, 42 S. Ct. 492."

Phyle v. Duffy, 334 U.S. 438, 439, 68 S. Ct. 1131, 92 L. ed. 1494, 1499.

This language of Mr. Justice Reed, delivering the majority opinion of this Court in the case last cited is of itself sufficient authority that each of the questions here involved is substantial.

(2) **The Legislature cannot create a conclusive presumption in a criminal case.** Even a statute creating a disputable presumption in a criminal case is void unless there is some rational connection between the fact proved and the ultimate fact presumed. (*Morrison v. California,* 291 U.S. 82, 54 S. Ct. 281, 78 L. ed. 664; *Tot v. United States,* 319 U.S. 463, 63 S. Ct. 1241, 87 L. ed. 1519; *People v. Murguia,* 6 Cal. (2d) 190, 57 Pac. (2d) 115; *Western & A. R. Co. v. Henderson,* 279 U.S. 639, 49 S. Ct. 445, 73 L. ed. 884.)

The creation of a conclusive presumption by the Legislature violates several constitutional principles. It may constitute a deprivation of due process of law and of the equal protection of the law and an invasion of the province of the judiciary.

> **"The Legislature does not possess the power to declare what shall be conclusive evidence of a fact, as such a declaration would be an invasion of the power of the judiciary * * * the Supreme Court of the United States has held that a statute creating a presumption which operates to deny a fair opportunity to rebut it contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution."**
>
> *Carolene Products Co. v. McLaughlin,* 365 Ill. 62, 5 N.E. (2d) 447.

> "Even the Legislature itself does not have the power to declare what shall be conclusive evidence contrary to the fact * * * the Legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of

his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court."

Juster Bros. v. Christgau, 214 Minn. 108, 7 N.W. (2d) 501.

When the question of the constitutionality of the provisions of the California Penal Code providing for the dual trial where insanity is pleaded was first passed upon by the Supreme Court of California in *People v. Troche,* 206 Cal. 35, 273 Pac. 767, where the validity of the statutes was upheld, Justice Preston of that Court, in a powerful dissent, denounced the law as **"a step toward a return to the dark ages."**

He then proceeds as follows:

"It will be noted that on the first half of this bifurcated trial or hearing under this procedure the jury may not stop by merely finding that the defendant physically did or did not do the prohibited act. The jury must go further and find the existence or absence of all the elements of the crime charged. The jury must convict the defendant before any verdict adjudicating sanity may be announced. Even though the jury believe the defendant to have been insane, yet under its oath it must, in violation thereof, attribute sanity to him, convict him of the crime, report the finding to the court, and assent in open court to the result. Indeed, in a case of first degree murder the jury must also fix the punishment at life or death. The defendant, in other words, with condemnation resting upon his head and in some instances with execution facing him, must sub-

mit the issue of his sanity to the judgment of his condemnors, condemnors who have already adjudged him sane upon a modicum only of the available evidence that should have been considered by them. I repeat that a sovereign must indeed be unjust who exacts a verdict of guilty by such a method. Surely this court has the power and is charged absolutely with the duty of preventing such a misuse of the machinery of justice.

"But the legal infirmities of these provisions are easily discerned. They undertake to subdivide an indivisible integer, and therein lies their chief infirmity. In other words, the plea of not guilty necessarily includes within it the element of insanity. This is true not because of any legislative fiat, but because sanity is a fundamental element of all amenableness to punishment and is the prime ingredient of the criminal legislation of all civilized countries. (See Pen. Code, secs. 20, 21, 26.) There can be no malice, deliberation or premeditation without sanity. There can be no criminal intent—indeed, no criminal act—where there is no sanity."

The learned Justice in the course of the opinion cites a long array of decisions including the language of Mr. Justice Lurton of this Court in the case of *Mobile, etc. R. Co. v. Turnipseed,* 219 U.S. 35, 31 S. Ct. 136, 55 L. ed. 78, and *Hammond v. State,* 78 Ohio St. 15, 84 N.E. 416, holding that the legislature may not **"create a conclusive presumption of guilt against the accused as to any element of the crime charged."**

It is true that in the *Troche* case this Court denied certiorari (280 U.S. 524, 50 S. Ct. 87, 74 L. ed. 592), but such a denial, it has been repeatedly stated, "imports no expression of opinion upon the merits of the case."

Agoston v. Pennsylvania, 340 U.S. 844, 71 S. Ct. 9, 95 L. ed. 619.

(3) **The manner of inflicting the death penalty cannot be delegated to any individual.** In attempted answer to the contention raised by petitioner that Section 3604 of the California Penal Code, which provides that the punishment of death shall be inflicted by the administration of a lethal gas is unconstitutional and a deprivation of due process of law because it permits the warden of the state prison to inflict death by any gas which he may select, the State Court cites the case of *State v. Gee Jon,* 46 Nev. 418, 211 Pac. 676, in which a statute of that state, which provides for the infliction of the death penalty by the administration of gas, is upheld. There is nothing in that decision which appeals to reason, or which shows any serious consideration of the constitutional question. It pronounces the mere *ipse dixit* of the Nevada Court. No serious argument is made that the statute is certain, and none could be made, for the obvious reason that the legislature has not designated what gas is to be used.

The sole argument in defense of the statute is that it is to be presumed that the warden will not inflict a cruel punishment or employ a gas which will cause severe pain. This proposition is self re-

futing. It says in effect that the State confers the power upon the warden to select the means of executing the judgment, trusting that he will act wisely and humanely. Such a power cannot be delegated to an administrative officer. (*Phyle v. Duffy,* 334 U.S. 431, 68 S. Ct. 1131, 92 L. ed. 1494.)

The warden is given the power to torture or not to torture, to kill humanely or inhumanely. The statute contains no provision requiring the infliction of a painless death. It is not what has been done but what may be done that must govern this Court in its interpretation of the statute.

(4) **Infliction by the State of Cruel and Unusual Punishments Is Banned by the Fourteenth Amendment.**

> "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain, in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. **The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.**"
>
> *Louisiana v. Resweber,* 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (Majority opinion).

THE STAGE OF THE PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED.

These matters are set forth with appropriate reference to, and quotations from, the record in the summary statement of the matter involved and need not be repeated.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The State Court has decided a federal question of substance not heretofore specifically determined by this Court, in a manner not in accord with the applicable decisions of this Court for the reasons heretofore stated of the grounds upon which it is contended that the questions involved are substantial, the restatement of which is unnecessary.

In view of the thoroughness of the foregoing discussion of the grounds on which it is claimed that the questions involved are substantial, and the citation of the authorities under that heading, we deem a supporting brief unnecessary to the consideration of this petition, and omit the same in the interest of brevity.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Justices of the Supreme Court of the State of California, commanding them to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the cause

aforesaid that the same may be reviewed by Your Honors, and that the judgment be reversed.

Dated, San Francisco, California,
June 12, 1953.

EDWARD T. MANCUSO,
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MANCUSO, HERRON & WINN,
JOHN WYNNE HERRON,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
June 12, 1953.

EDWARD T. MANCUSO,
Of Counsel for Petitioner and Member of the Bar of the Supreme Court of the United States.

18

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 214

JOSEPH A. DAUGHERTY,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINION BELOW

The opinion of the Supreme Court of the State of California affirming the judgment of the Superior Court of the State of California, in and for the County of Sonoma, is reported at 40 Advance California Reports 910, 256 Pacific 2d 911.

JURISDICTION

The jurisdiction of this court has been invoked by petitioner pursuant to 28 U. S. C., Sec. 1257, paragraph 3, and Rule 38, Section 5(a), Rules Supreme

Court of the United States. The judgment of the Supreme Court of the State of California was entered on May 5, 1953. A petition for rehearing was denied by the California Supreme Court on May 28, 1953. The petition for writ of certiorari was filed on July 29, 1953, within the ninety-day period as provided by Rule 38½, Rules, Supreme Court of the United States.

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to the Supreme Court of the State of California to review a judgment of that court affirming the judgment of the Superior Court of the State of California, in and for the County of Sonoma, which found petitioner guilty of the crime of murder in the first degree and imposed a death penalty. The judgment of the Supreme Court of the State of California which was entered on May 5, 1953, is reported at 40 Advance California Reports 910, 256 Pacific 2d 911.

Petitioner was indicted by the grand jury of Sonoma County, State of California, on March 19, 1952, for the offense of murder, in that on or about February 28, 1952, in the County of Sonoma, State of California, petitioner wilfully, unlawfully, feloniously and with malice aforethought murdered one Florena Daugherty, a human being, contrary to the form, force and effect of the statute (Tr. 1).* On April 4, 1952, petitioner entered his pleas of not guilty and not guilty by reason of insanity (Tr. 2).

* Tr. references are to printed Transcript of Record.

On April 9, 1952, the superior court made its order appointing two alienists to examine petitioner and investigate his sanity (C. T. 3-4).†

On April 28, 1952, the selection of the jury was started and the trial continued on several different days until May 22, 1952, on which latter date the jury brought in its verdict finding petitioner guilty of murder in the first degree without recommendation (C. T. 118; Tr. 2).

Petitioner's trial on his plea of not guilty by reason of insanity was had on May 29, June 2, 4 and 5, 1952, before the same jury, and on the latter date the jury brought in its verdict finding petitioner to be sane at the time of the commission of the offense charged (C. T. 126-129; Tr. 2). A motion for a new trial was made and denied (C. T. 130-132). A motion was made pursuant to Section 1368 of the California Penal Code, which was denied (Tr. 4). Petitioner was thereupon sentenced to the death penalty (C. T. 132; Tr. 5). An automatic appeal pursuant to provisions of Section 1239(b) of the Penal Code of the State of California was taken.

After a review of the entire record in this matter the Supreme Court of the State of California in its decision (*People* v. *Daugherty*, reported at 40 A. C. 910, 256 Pacific 2d 911) affirmed the judgment of the superior court and found that the evidence was sufficient to support the verdict of murder in the first degree; that there was no prejudicial misconduct of the jury or the trial court; that Sections 1016

† C. T. references are to typewritten Clerk's Transcript.

and 1026 of the California Penal Code providing for a double plea of not guilty and not guilty by reason of insanity, and a bifurcated trial on the issues did not violate the due process clauses of the Constitution of the United States and State of California; that Section 3604 of the Penal Code providing that punishment of death shall be inflicted by the administration of "a lethal gas" was not indefinite or vague and that the instructions as given by the trial court did not constitute prejudicial error.

STATEMENT OF FACTS

Petitioner married the decedent, Florena Daugherty, in 1933 and they had five children (R. T. 543).‡ The homicide occurred in the early morning hours of February 28, 1952 (R. T. 397). Petitioner did not testify at the trial and there was little dispute that he killed his wife, Florena, his main contention being that his mind had so deteriorated from illness and the consumption of alcoholic beverages that he was incapable of premeditation or of forming the intent to commit murder.

Several years previous to the homicide petitioner and decedent had engaged in quarrels and arguments (R. T. 546, 551, 562) and petitioner had made threats against decedent stating in the words of his daughter, Barbara, that he "would come back and get us" (R. T. 547, 552). In December of 1951, after petitioner had been drinking he believed his wife was disloyal to him and while armed with a gun went

‡ R. T. references are to typewritten Reporter's Transcript.

looking for her at the house of a tenant nearby his own home. He then fired some shots in the air (R. T. 547, 570, 574-5, 970). Early in 1952 petitioner filed suit for divorce against his wife, Florena Daugherty, and on the morning of February 27, 1952, was granted an interlocutory decree of divorce (R. T. 889, 958). During the course of that day he attended his place of business and there was nothing unusual about his behavior or appearance (R. T. 681, 890).

At about 4.30 on that afternoon he left his business—a beauty shop (R. T. 891). From about 6.30 to 10 p.m. he was in the company of Mrs. Case, an employee of his, and a friend, William Oliver, at both petitioner's apartment and that of Mrs. Case. He consumed several drinks during this period of time but his conversation was sensible and rational (R. T. 462, 466, 892-896). Several witnesses who saw petitioner between 10 and 11.30 p.m. disagreed as to whether or not he was drunk (R. T. 475, 481).

Between 11 and 11.30 p.m. petitioner took a cab to the Daugherty home which was located about three miles from the town of Santa Rosa, Sonoma County, California (R. T. 355). The cab driver testified that petitioner was in good spirits and acted rational (R. T. 475, 481, 494). The cab driver, who was directed by petitioner to wait for him outside the Daugherty home, observed petitioner and Mrs. Daugherty through the dining room windows of their house (R. T. 490). Petitioner took a piece of white paper from his hip pocket and waved it at Mrs. Daugherty. She endeavored to shove petitioner out of the house

(R. T. 492). Petitioner left and on returning to the cab stated, "The God damned dirty bitch. She thinks she is smart but I will show her." (R. T. 492.) He further stated that he had gotten his "clincher" that day and that he "just went out there to show her my clincher." (R. T. 508.) Petitioner was returned to his apartment by the cab driver at about 11.30 p.m. (R. T. 494.)

Between 1.30 and 2.30 a.m. of February 28, 1952, petitioner was observed endeavoring to back his car out of his garage and the observer as well as Mrs. Case to whom he had spoken for a few minutes, stated that petitioner was drunk (R. T. 526-529, 898-9). From the testimony of various witnesses and the inferences therefrom it appeared petitioner drove to the Daugherty home and parked his car. Mrs. Daugherty and the four children had retired earlier in the evening (R. T. 593). Petitioner severed the telephone wire at the outside of the house, and forced an entry (R. T. 428, 667). Mrs. Daugherty locked herself in the bedroom but after his insistence let him in (R. T. 595). Petitioner was holding a hunting knife in his upraised hand but put it in his belt at her request (R. T. 596). Mrs. Daugherty fled from the house to the yard and petitioner pursued her (R. T. 497). While there were no eyewitnesses to the crime, petitioner was observed kicking Mrs. Daugherty while she was lying in the yard and he was standing over her body (R. T. 610, 640). Petitioner left the premises, and the children, at Mrs. Daugherty's request, ran to summon help (R. T. 342, 613). A

neighbor responded and saw Mrs. Daugherty lying on her back in the yard, nude. She was alive and conscious (R. T. 343, 346). He drove to town for the police (R. T. 353, 354). On their arrival Mrs. Daugherty was still alive, lying nude; her body covered with blood (R. T. 413). Quantities of blood were found on the premises (R. T. 712). There were abrasions on her thigh with particles of dirt therein, indicating that she had been dragged (R. T. 394). Her body contained numerous stab wounds including some on the upper part of her arm, shoulder, near the hip joint, abdomen and forearm (R. T. 390-399). The cartilage of her nose was broken (R. T. 396). The fatal wound on the side of the left breast was three inches wide and six inches deep (R. T. 390, 397). The evidence showed that the wound had penetrated the heart and had caused death from internal hemorrhage (R. T. 397).

In addition to the blood in the yard which covered a considerable area, a bloodstained hunting knife and the decedent's torn nightgown were found (R. T. 420, 423, 427, 453, 710). A knife scabbard whose inside configuration fit the knife, was found at the petitioner's apartment (R. T. 751, 828, 853).

Just prior to his arrest, petitioner at about 3 a.m. on the morning of the crime made telephone calls to several different persons, stating that he had killed his wife (R. T. 858, 901, 922).

At the time of his arrest in his office petitioner had blood on his shirt, pants, about his office and car

(R. T. 628, 684, 700, 744). Although petitioner did not make a formal statement to the peace officer, when asked what happened he stopped, gritted his teeth, shook his fist at the ground and said, "I stood there and watched the dirty son-of-a-bitch die. I couldn't take it any longer." (R. T. 701.) When he was examined at the sheriff's office, petitioner had the interlocutory decree of divorce on his person. He did not appear drunk (R. T. 957, 959). He told an officer, "I told her not to push me too far. I told her not to push me too far or I would fix her, and I did. * * * The slut, I fixed her." (R. T. 929.)

Although the petitioner did not take the stand, he produced evidence through other witnesses that he was intoxicated on the night in question and had overindulged in alcohol for a considerable period of time prior thereto; that he suffered from Buerger's disease and other ailments, and that he had changed and become sullen and morose (R. T. 995, 996-7, 1000, 1046-9). His personal physician testified that petitioner was suffering from heart disease, ulcers, bladder trouble, Buerger's disease and chronic alcoholism, and that because of those things when he committed the offense he did not have the capacity to form the intent to commit murder (R. T. 1019-20).

On rebuttal the prosecution produced as a witness Dr. Toller, an expert psychiatrist, who testified that petitioner did have such capacity as shown by his activities on the night in question (R. T. 1072-1081, 1082-1086).

In this respect, it should be noted that the petitioner's statement that "an alienist called by the prosecution testified that in his opinion the accused was in a state in which he was unable to distinguish between right and wrong, or to appreciate the possible consequences of his acts" (R. T. 1058) is not borne out by the record. For Dr. Toller, the psychiatrist whose testimony is referred to was testifying with regard to a hypothetical case and not with reference to the petitioner herein whom he definitely testified was legally and medically sane. (R. T. 1058, 1430-1451, 1072-1081, 1082-1086.)

At the second phase of the trial on the petitioner's plea of not guilty by reason of insanity, Dr. Carlson, the petitioner's general physician, testified as to his history of nervousness, indigestion, heavy consumption of alcohol, duodenal ulcer, heart lesion and evidence of Buerger's disease (R. T. 1297-1300). That it was his opinion that petitioner was becoming more nervous and irritable and becoming more unreasonable and not acting as a normal individual should (R. T. 1302). It was his further opinion that petitioner was suffering from pathological intoxication which was a form of insanity, and that at the time the victim was killed the petitioner did not know the nature and quality of his act nor could he distinguish between right and wrong (R. T. 1306, 1310).

Evidence was adduced from intimate acquaintances, friends, and relations of petitioner, that they believed him insane at the time the offense was committed and

that he did not know the nature and consequences of his acts nor could he distinguish between right and wrong (R. T. 1314-16, 1319-20, 1321-24, 1343, 1346-8, 1348-9, 1349-50, 1354, 1361). Dr. Slattery, a psychologist, and Dr. Morris, a psychiatrist, both testified that they believed petitioner insane (R. T. 1369-1372, 1395-97).

Dr. Toller, a psychiatrist who testified for the prosecution, was of the opinion that the petitioner was sane at the time of the commission of the offense (R. T. 1430-1451).

The two court-appointed psychiatrists, Doctors Kelley and Miller, found petitioner both legally and medically sane at the time of the commission of the offense in that he had the ability to comprehend the nature and quality of his acts as well as being capable of determining right from wrong; that his memory and mental structure was intact and that there was no deterioration or brain damage of the frontal lobe (R. T. 1430-1451, 1537-1542, 1549-1550).

QUESTIONS PRESENTED

Whether Sections 1016 and 1026 of the Penal Code of the State of California providing for the dual pleas of "not guilty" and "not guilty by reason of insanity" and a bifurcated trial thereon constitute a denial of due process of law under the Fourteenth Amendment.

Whether Section 3604 of the Penal Code of the State of California providing for the execution of the death penalty by "a lethal gas" is so vague and

ambiguous as to provide for a cruel and unusual punishment and results in a lack of due process of law contrary to the provisions of the Fourteenth Amendment.

STATUTES INVOLVED

The pertinent provisions of the Penal Code of the State of California are set forth on pages 2 to 4 of the Petition for Certiorari and the Appendix hereto.

SUMMARY OF ARGUMENT

I. The Decision of the California Supreme Court Is Correct
- A. Sections 1016 and 1026 of the Penal Code Are Constitutional, Their Constitutionality Having Been Upheld Since 1927
- B. Section 3604 of the Penal Code Is Constitutional

II. There Is no Substantial Federal Question Presented
- A. Similar Attacks on the Constitutionality of Sections 1016 and 1026 of the California Penal Code Have Been Dismissed For Want of a Substantial Federal Question
- B. Petitioner's Attack on the Constitutionality of Section 3604 of the Penal Code Is Without Substance
- C. Petitioner Received a Fair and Impartial Trial Under California Law

ARGUMENT

I. The Decision of the California Supreme Court Is Correct

The decision of the California Supreme Court in the instant matter accorded to the petitioner herein that due process to which he was entitled by the law of the land. This process in the State is regulated by the law of the State and the due process clause of the Fourteenth Amendment does not control mere forms of procedure in the state courts or regulate practice therein.

Adamson v. *California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903;

Holden v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780;
Hurtado v. *California*, 110 U. S. 516, 4 S. Ct. 11, 28 L. Ed. 232;
Twining v. *New Jersey*, 211 U. S. 78, 112, 29 S. Ct. 14, 53 L. Ed. 97;
Leland v. *Oregon*, 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302.

A. SINCE THE AMENDMENT OF PENAL CODE SECTIONS 1016 AND 1026 IN THE YEAR 1927, THEIR CONSTITUTIONALITY HAS BEEN CONSISTENTLY UPHELD

Section 1016 of the California Penal Code enumerates the five kind of pleas which may be entered; they include "not guilty" and "not guilty by reason of insanity." The section then declares, "a defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged.* * *" Section 1026 provides that "when a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant plead only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court."

Under California law there is only one trial (*People* v. *Troche*, 206 Cal. 35, 48, 273 P. 767; *People* v. *Leong Fook*, 206 Cal. 64, 70, 273 P. 779; *People* v. *Marshall*, 209 Cal. 540, 547; 289 P. 629). This trial is broken up into two sections if insanity is pleaded as a defense. Upon the first stage the issues raised by the general plea of not guilty are tried; on the second stage, if the verdict is guilty on the first, the issues are purely those of legal insanity. The plea of not guilty by reason of insanity has been held to be one of confession and avoidance.

People v. *Troche*, 206 Cal. 35, 44, 273 P. 767;
People v. *Leong Fook*, 206 Cal. 64, 273 P. 779;
People v. *French*, 12 Cal. 2d 720, 739, 87 P. 2d 1014;
People v. *Wells*, 33 Cal. 2d 330, 349, 202 P. 2d 53.

In *People* v. *Wells*, 33 Cal. 2d 330, 351, 202 P. 2d 53 (cert. den. 338 U. S. 836, 70 S. Ct. 43, 94 L. Ed. 510), the California Supreme Court held (at page 351, 354):

"The statute (as to the first phase of the trial) conclusively presumes the defendant to be sane; i.e., to be *capable* of guilt insofar as sanity is concerned; it does not, conclusively or otherwise, presume any *factual* element of guilt; it does not even declare any presumption of criminal capacity other than legal sanity.

"Legal sanity, in a criminal case, under our court declared law, means 'reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and

criminal and will subject him to punishment' (*People* v. *Sloper* (1926), 198 Cal. 238, 245 (244 P. 362), and cases there cited.) Thus, the statutory conclusive presumption of sanity is only that defendant's mental condition was such that he was able to know the nature of his act and appreciate that it was wrongful and could subject him to punishment; there is no presumption that the defendant *did* in fact have any specific state of mind (intent or motive) essential to comprise, together with the wrongful act, a particular kind or degree of crime.

* * * * *

"By bifurcating the trial the Legislature is not to be presumed to have intended to deny to a defendant the presumption of innocence, or the right to produce competent evidence to prove—or to raise a reasonable doubt concerning—his innocence, as to any element of guilt, or to have deleted any element of due process. The Legislature, by the enactments in question, *has* separated the stages of the trial on the pleas of not guilty and not guilty by reason of insanity but *it has not changed the elements of guilt of any crime nor altered the presumption of innocence.* The defendant is still presumed to be innocent at all stages of the trial of all factual elements of guilt, notwithstanding the conclusive presumption, at the first stage, that he is sane."

The court in the *Wells* case (33 Cal. 2d 330, 355 (cert. den. 338 U. S. 836, 70 S. Ct. 43, 94 L. Ed. 510)),

then readopted the language of *People* v. *Troche*, 206 Cal. 35, 44, as follows:

> " 'The requirement under the present system, that the two issues be separately tried, while a departure from the old method of procedure, *is but a departure in procedure. Each issue must still be tried* by a jury of twelve impartial persons, and the verdict must be unanimous. In substance, the old and the new systems are alike. *The guaranteed right of a trial by jury is as inviolate and just as much secured to all under the new system as it was under the old.*' "

To the same effect, see:

People v. *Hickman*, 204 Cal. 470, 268 P. 909, 270 P. 1117;
People v. *Troche*, 206 Cal. 35, 273 P. 767 (app. dis. 280 U. S. 524, 74 L. Ed. 592, 50 S. Ct. 87);
People v. *Leong Fook*, 206 Cal. 64, 273 P. 779;
People v. *Dias*, 210 Cal. 495, 292 P. 459;
People v. *Valenzuela*, 7 Cal. 2d 650, 62 P. 2d 596;
People v. *Groves*, 9 Cal. App. 2d 317, 49 P. 2d 888;
People v. *Boggs*, 12 Cal. 2d 27, 82 P. 2d 368;
People v. *French*, 12 Cal. 2d 720, 87 P. 2d 1014;
People v. *D'Angelo*, 13 Cal. 2d 203, 88 P. 2d 708;
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People v. *Coleman*, 20 Cal. 2d 399, 126 P. 2d 349 (app. dis. 317, U. S. 596, 87 L. Ed. 487, 63 S. Ct. 162; cert. den. 320 U. S. 767, 88 L. Ed. 458, 64 S. Ct. 66);
People v. *Ming*, 27 Cal. 2d 443, 164 P. 2d 487;
People v. *Wells*, 33 Cal. 2d 330, 202 P. 2d 53 (cert. den. 338 U. S. 836, 94 L. Ed. 510, 70 S. Ct. 43);

People v. *Walker*, 33 Cal. 2d 250, 201 P. 2d 6 (cert. den. 336 U. S. 940, 93 L. Ed. 1098, 69 S. Ct. 744);
People v. *Davis*, 94 Cal. App. 192, 270 P. 715;
People v. *LaCrosse*, 5 Cal. App. 2d 696, 42 P. 2d 596;
People v. *Crowder*, 69 Cal. App. 2d 304, 158 P. 2d 988;
People v. *Field*, 108 Cal. App. 2d 496, 238 P. 2d 1052;
People v. *Danielly*, 33 Cal. 2d 362, 202 P. 2d 18 (cert. den. 337 U. S. 919, 93 L. Ed. 1728, 69 S. Ct. 1162);
People v. *LeTourneau*, 34 Cal. 2d 478, 211 P. 2d 865.

In the case at bar, the petitioner has failed to show how the application of Sections 1016 and 1026 of the Penal Code has in any manner deprived him of due process of law under the Fourteenth Amendment. An examination of the record in this matter discloses that petitioner was allowed to introduce evidence on his "not guilty" plea to disprove that he had the necessary intent to commit murder of the first degree. As found by the California Supreme Court in its opinion at 40 A. C. 910, 930-1, the jury was fully instructed as to the burden of proof resting on the prosecution, the presumption of innocence, the doctrine of reasonable doubt, that defendant and petitioner's plea of not guilty put in issue every fact alleged in the indictment and every material element of the crime, as to the joint operation of act and intent, that specific intent was an element required and that they

must find beyond a reasonable doubt that petitioner had the mental capacity to form an intent.

People v. *Daugherty*, 40 A. C. 910, 930-931.

On the insanity issue, the jury was instructed that the defendant and petitioner herein had the burden of proving insanity by a preponderance of the evidence. The instructions were considered at length in the California Supreme Court's opinion, and no showing has been made in the instant petition or before the California courts that petitioner was in any way deprived of due process of law contrary to the provisions of the Fourteenth Amendment.

People v. *Daugherty*, 40 A. C. 910, 931-934.

In the recent case of *Leland* v. *Oregon*, 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302, this court upheld a statute of the State of Oregon which required a defendant raising the defense of insanity to prove his insanity beyond a reasonable doubt. In affirming the judgment of the Supreme Court of Oregon, this court stated (343 U. S. 790, 798-799):

> "In *Davis* v. *United States, supra*, we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But '(i)ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' *Snyder* v. *Massachusetts, supra*, at 105. 'The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies

of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.' Mr. Justice Frankfurter, concurring in *Malinski* v. *New York*, 324 U. S. 401, 417 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.

"Nothing said in *Tot* v. *United States*, 319 U. S. 463 (1943), suggests a different conclusion. That decision struck down a specific presumption created by congressional enactment. This Court found that the fact thus required to be presumed had no rational connection with the fact which, when proven, set the presumption in operation, and that the statute resulted in a presumption of guilt based only upon proof of a fact neither criminal in itself nor an element of the crime charged. We have seen that, here, Oregon required the prosecutor to prove beyond a reasonable doubt every element of the offense charged. Only on the issue of insanity as an absolute bar to the charge was the burden placed upon appellant. In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity."

Under California law and the instructions as given to the jury in the instant matter, the prosecution was required to prove beyond a reasonable doubt every element of the offense charged. Only on the issue of "not guilty by reason of insanity" was the burden

placed upon the petitioner to prove this by a preponderance of the evidence. It is apparent that in light of this court's reasoning in *Leland* v. *Oregon*, 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302, petitioner's contention that Sections 1016 and 1026 of the California Penal Code are unconstitutional in that they deprive him of due process of law is without merit and he has presented no grounds for a condemnation of California's procedure which as interpreted by the state courts has been held constitutional for some 25 years.

B. SECTION 3604 OF THE CALIFORNIA PENAL CODE PROVIDING FOR THE EXECUTION OF THE DEATH PENALTY BY MEANS OF "A LETHAL GAS" IS NOT UNCONSTITUTIONAL AS A FORM OF CRUEL AND UNUSUAL PUNISHMENT

Petitioner contends that because Section 3604 of the California Penal Code fails to designate the specific type of lethal gas to be inflicted upon a person sentenced to be executed and permits the warden to select the type of lethal gas to be used, said statute is unconstitutional. No showing was made in the state courts nor can a showing be made to this court by petitioner herein that the type of lethal gas used by the warden of the state prison has not killed humanely. Punishment by death is not *per se* cruel and unusual within the meaning of the constitutional provision (*Weems* v. *U. S.*, 217 U. S. 349, 54 L. Ed. 793, 30 S. Ct. 544). So long as the death inflicted is speedy and without undue pain or torture the constitutional provision against cruel and inhuman punishment is not violated.

In the case of *Louisiana* v. *Resweber*, 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422, this court recognized that the cruelty against which the Federal Constitution protects a convicted man under death sentence is cruelty inherent in the method of punishment and not necessarily the suffering involved in any method employed to extinguish life humanely.

In the case of *State* v. *Gee Jon*, 46 Nev. 418, 211 P. 676, the Nevada Supreme Court in upholding a similar statute, against the same contention as is sought to be raised herein, found that the statute was constitutional and not vague and indefinite (See, also, Note, 30 *A. L. R.* 1455).

The infliction of the death penalty by any of the methods ordinarily adopted by civilized people such as hanging, shooting, electrocution, or lethal gas does not meet the disapproval and condemnation of the conscience and reason of men generally nor shock the moral sense of the people where it is not disproportionate to the offense for which it is inflicted (24 *Corpus Juris Secundum*, Sec. 1978, p. 1190; 15 *Am. Jur.*, Secs. 527, 528, pp. 175-6). Prior to 1937 the California Legislature had prescribed that the punishment of death should "be inflicted by hanging the defendant by the neck until he is dead." (Former Penal Code, Sec. 1228.) In 1937 the California Penal Code was amended to provide that the punishment of death "shall be inflicted by the administration of a lethal gas." Petitioner has presented no evidence that the officials entrusted with the performance of this duty have in the past so performed their duty in a

manner constituting inhumane treatment of the condemned person, nor is there any threat of such present or future performance. Hence it is apparent that the attack on the constitutionality of this provision of the Penal Code is without merit and is not supported by any authorities.

The warden in carrying out the dictates of the Legislature is performing a purely ministerial task which is properly delegated to him. The case of *Phyle* v. *Duffy*, 334 U. S. 431, 68 S. Ct. 1131, 92 L. Ed. 1494, relating to the duty of a warden to initiate proceedings if there is good reason to believe a defendant sentenced to death is insane and providing for a court review of his action or nonaction is inapplicable and does not support the present contention of petitioner.

Respondent therefore submits that the statutes attacked by petitioner as unconstitutional as interpreted under a long line of California cases do not in any manner deprive petitioner of his rights under the Fourteenth Amendment to the Federal Constitution and do not constitute a deprivation of due process of law as to petitioner.

II. No Substantial Federal Question Has Been Presented

A. SIMILAR ATTACKS ON THE CONSTITUTIONALITY OF SECTIONS 1016 AND 1026 OF THE CALIFORNIA PENAL CODE HAVE BEEN DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

The precise points sought to be raised in the instant petition have been presented to this court in the cases of *Troche* v. *California*, 280 U. S. 524, 50 S. Ct. 87, 74 L. Ed. 592, and *Coleman* v. *California*, 317 U. S. 596,

63 S. Ct. 162, 87 L. Ed. 487. In each of these cases this court by a *per curiam* opinion dismissed the appeals for want of a substantial federal question. Also in *Troche* v. *California*, and *Coleman* v. *California*, certiorari was denied. Again, this court when these questions were sought to be raised on petitions for certiorari, denied certiorari in the following cases:

Wells v. *California*, 338 U. S. 836, 70 S. Ct. 43, 94 L. Ed. 510;

Danielly v. *California*, 69 S. Ct. 1162, 337 U. S. 919, 93 L. Ed. 1729;

Walker v. *California*, 336 U. S. 940, 93 L. Ed. 1098, 69 S. Ct. 744.

The cases cited by petitioner in support of his contention that a substantial federal question is presented, are factually dissimilar to the case at bar and not authority for his contention. *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, involved the use of perjured testimony in obtaining a conviction; *Moore* v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265, involved a conviction based upon a trial where there were threats of mob violence; *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, involved the question of a deprivation of the right to counsel; *Brown* v. *Mississippi*, 274 U. S. 278, 80 L. Ed. 682, involved a conviction based upon confessions obtained by the use of the third degree; *Rochin* v. *California*, 342 U. S. 165, 72 S. Ct. 205, 96 L. Ed. 183, involved the use of illegally obtained evidence such as to shock the conscience.

In the case at bar, none of the foregoing problems was present. Petitioner does not point to any evidence offered by him which was rejected or any evidence submitted by him under his plea of not guilty by reason of insanity which if it had been submitted under his plea of not guilty would have caused the jury to have rendered a different verdict. All evidence which petitioner sought to introduce short of legal insanity which might have tended to show an absence of a clear intent to kill and deliberation and premeditation was permitted under his not guilty plea. Therefore it does not appear that he is in a position to assail the statutes as violative of the Fourteenth Amendment. Moreover, in the light of this court's recent decision in the case of *Leland* v. *Oregon*, 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302, the questions presented do not substantiate petitioner's contention of a denial of due process of law.

B. PETITIONER'S ATTACK ON THE CONSTITUTIONALITY OF SECTION 3604 OF THE PENAL CODE IS WITHOUT SUBSTANCE

As stated by the California Supreme Court in rejecting petitioner's contention that Section 3604 was unconstitutional:

> "It is doubtful that this question is properly raised on this appeal since ordinarily we are not concerned with the execution of the judgment and there is no showing that such a gas has ever been used or will be used in this case."
>
> *People* v. *Daugherty*, 40 A. C. 910, 928.

Since petitioner cannot show that this provision of the statute as administered by the state officers would deprive him of any rights protected by the Federal Constitution save by his conjecture that such might possibly happen, it is apparent that there is nothing in the record before this court that would warrant the striking down of a provision of state law which has been justly administered and where there is no showing "that fundamental fairness essential to the very concept of justice" has been ignored.

Lisenba v. *California*, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166;
Stein v. *New York*, 346 U. S. 156, 73 S. Ct. 1077, 97 L. Ed. (adv.) 1007.

C. PETITIONER RECEIVED A FAIR AND IMPARTIAL TRIAL UNDER CALIFORNIA LAW

The record before this court discloses that petitioner received that fair and impartial trial to which he was entitled by both the Federal and State Constitutions. He was represented by counsel of his own choice at the trial and on his appeal. His entire case was reviewed on an automatic appeal (Section 1239(b), Penal Code) and as appears from the decision of the California Supreme Court his contentions considered at length and rejected.

It is a fundamental rule that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional and must show that the alleged unconstitutional feature injures him

and so operates as to deprive him of rights protected by the Federal Constitution (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, 555). This petitioner has failed to do.

The language of this court in the case of *Stein* v. *New York*, 346 U. S. 156, 196, 73 S. Ct. 1077, 97 L. Ed. (adv.) 1007, would appear applicable:

> "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance. But we cannot see the slightest justification for reading the Fourteenth Amendment to deny the State of New York the power to hold these defendants guilty on the record before us.
>
> "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law."

CONCLUSION

Respondent respectfully submits that the questions sought to be raised are of a purely state character; that similar cases involving these problems have been dismissed by this court for want of a substantial federal question. The record discloses that petitioner has been accorded "due process of law" in that his case was conducted according to the settled course of judicial proceedings as established by the law of the

State of California and that the law itself was not repugnant to the Federal Constitution.

Frank v. *Mangum*, 237 U. S. 309, 326.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Penal Code of the State of California

Section 1239(b): When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel.

Section 3604: The punishment of death shall be inflicted by the administration of a lethal gas.

o

OCT 1 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 214

JOSEPH A. DAUGHERTY,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITIONER'S REPLY BRIEF
in support of
PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California.

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In the Supreme Court
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PETITIONER'S REPLY BRIEF
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State of California.

To the Honorable Hugo L. Black, Senior Associate Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pursuant to the provisions of Subdivision 4(a) of Rule 38 of the rules of this Court, petitioner respectfully presents this reply brief in the above entitled cause for the consideration of your Honors.

As we have no substantial criticism of the statement of the case and the statement of facts contained in the brief of respondent filed by the Attorney General of the State of California in opposition to the petition for a *writ of certiorari,* we shall proceed forthwith to reply to the argument therein contained.

REPLY TO THE ARGUMENTS ADVANCED BY RESPONDENT.

1. REPLY TO THE ARGUMENT THAT THE DECISION OF THE CALIFORNIA SUPREME COURT IS CORRECT.

It is stated at the outset by counsel for respondent that the decision of the California Supreme Court in *People v. Daugherty,* 40 Advance California Reports 910, 256 Pac. (2d) 911, accorded to the petitioner that due process to which he was entitled by the law of the land. Respondent then proceeds:

> "This process in the State is regulated by the law of the State and the due process clause of the Fourteenth Amendment does not control mere forms of procedure in the state courts or regulate practice therein."

That this statement is utterly misleading and not in accord with the decisions of this Court will be apparent from a reference to the cases cited in its support.

The first of these is *Adamson v. California,* 332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903. The point there decided by the majority of the Court was merely

this, that a statute of the State of California permitting the trial Court or the district attorney to comment upon the refusal of the defendant to testify did not infringe his constitutional rights, even though, if the accused took the stand, he would be subject to impeachment by evidence of his prior convictions of other crimes. However, Mr. Justice Reed who wrote the majority opinion is careful to say that, "the purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction." He then adds: "When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced."

Some three or four sentences later, we find the following highly significant language:

> "There is no basis in the California law for appellant's objection on due process or other grounds that the statutory authorization to comment on the failure to explain or deny adverse testimony shifts the burden of proof or the duty to go forward with the evidence. Failure of accused to testify is not an admission of the truth of the adverse evidence. Instruction told the jury that the burden of proof remained upon the state and the presumption of innocence with the accused. Comment on failure to deny proven facts does not in California tend to supply any missing element of proof of guilt."

Here we pause for a moment to point out what must be obvious from the foregoing language of the majority opinion of this Court, to-wit, that the *Adamson* case was rescued from reversal solely because of the fact that the California decisions specifically hold that the failure of the accused to testify does not create **any presumption** of guilt.

In the case at bar, we have quite a different situation. The California statute here challenged (Penal Code of California, Sections 1016 and 1026) creates a **conclusive presumption** of the sanity of the defendant upon the trial of the issues raised by the indictment and his plea of not guilty.

---

2. THE OPINION OF MR. JUSTICE BLACK IN THE ADAMSON CASE.

It is apparent from both the majority, and the concurring opinion of Justice Frankfurter in the *Adamson* case, that the decision was based entirely on *Twining v. New Jersey,* 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97, another decision cited by respondent in the case at bar.

In the dissent of Mr. Justice Black, which became famous almost overnight and which is fast becoming regarded by the profession as pronouncing the correct rule, that all of the provisions of the Bill of Rights are protected from State invasion by the due process clause the *Twining* case is torn to tatters, to very rags. Thus, at 332 U.S. 84:

"Later decisions of this Court have completely undermined that phase of the Twining doctrine which broadly precluded reliance on the Bill of Rights to determine what is not a 'fundamental' right. Later cases have also made the Hurtado Case an inadequate support for this phase of the Twining formula. For despite Hurtado and Twining, this Court has now held that the Fourteenth Amendment protects from state invasion the following 'fundamental' rights safeguarded by the Bill of Rights; right to counsel in criminal cases, *Powell v. Alabama,* 287 U. S. 45, 67, 77 L. ed. 158, 169, 53 S. Ct. 55, 84 A.L.R. 527, limiting the Hurtado case; see also *Betts v. Brady,* 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252, and *De Meerleer v. Michigan,* 329 U. S. 663, ante, 471, 67 S. Ct. 596; freedom of assembly, *De Jonge v. Oregon,* 299 U. S. 353, 364, 81 L. ed. 278, 283, 57 S. Ct. 255; at the very least, certain types of cruel and unusual punishment and former jeopardy, *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, ante, 422, 67 S. Ct. 374; the right of an accused in a criminal case to be informed of the charge against him, see *Snyder v. Massachusetts,* 291 U. S. 97, 105, 78 L. ed. 674, 677, 54 S. Ct. 330, 90 A. L. R. 575; the right to receive just compensation on account of taking private property for public use, *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581. And the Court has now through the Fourteenth Amendment literally and emphatically applied the First Amendment to the States in its very terms. *Everson v. Board of Education,* 330 U. S. 1, ante, 711, 67 S. Ct. 504, 168 A. L. R. 1392; *West Virginia State Board of Education v.*

Barnette, 319 U. S. 624, 639, 87 L. ed. 1628, 63 S. Ct. 1178, 147 A. L. R. 674; *Bridges v. California,* 314 U. S. 252, 268, 86 L. ed. 192, 206, 62 S. Ct. 190, 149 A. L. R. 1346."

Again:

> "The Court in Twining evidently was forced to resort for its degradation of the privilege to the fact that Governor Winthrop in trying Mrs. Anne Hutchinson in 1627 was evidently 'not aware of any privilege against self-incrimination or conscience of any duty to respect it.' Of course not. Mrs. Hutchinson was tried, if trial it can be called, for holding unorthodox views. People with a consuming belief that their religious convictions must be forced on others rarely believe that the unorthodox have any rights which should or can be rightfully respected."

After stating that the founders of this country wanted no more such "trials," the Senior Associate Justice adds:

> "I cannot consider the Bill of Rights to be an outworn 18th Century 'straight jacket.' "

It is further to be noted that in addition to Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge likewise dissented in the *Adamson* case.

It is likewise noteworthy that the *Twining* case itself was decided over the eloquently protesting voice of Mr. Justice Harlan:

> "What, then, were the privileges and immunities of the citizens of the United States, which the Fourteenth Amendment guards against encroachment by the state? Whatever they were, that amendment placed them beyond the power of any state to abridge." (211 U.S. 122.)

We have dealt thus at length on the *Adamson* case for the purpose of demonstrating the wholly false theory of respondent that a state can make its own due process.

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3. THE INAPPLICABILITY OF LELAND v. OREGON, 343 U. S. 790, 72 S. Ct. 1002, 96 L. ed. 1302.

Respondent relies heavily upon this case. The summary of the decision (96 L. ed. 1302) shows at first blush that it is not applicable to, much less determinative of, the question of the constitutionality of the dual trial statute of the State of California. We therefore quote the summary:

> "Oregon criminal law provides that 'morbid propensity' to commit a crime is no defense. It also casts upon a defendant the burden of proving his defense of insanity 'beyond a reasonable doubt.' At defendant's trial for murder in the first degree, the court instructed the jury in accordance with these statutory rules, but also charged that the state had the burden of proving beyond a reasonable doubt every element of the crime, including premeditation, deliberation, malice, and intent. Defendant's conviction was affirmed by the Oregon Supreme Court. He raised due process objections.

"In an opinion by Clark, J. seven members of the United States Supreme Court held that due process was not violated either by the state's casting upon the defendant the burden of proving insanity 'beyond a reasonable doubt' or by its choosing 'the right and wrong' test rather than the 'irresistible impulse' test of insanity.

"Frankfurter and Black, J J., dissented on the ground that due process was violated by the state's requiring the defendant to prove his insanity 'beyond a reasonable doubt.'"

In an annotation to this decision, 96 L. ed. 1314, the editor cites certain language in the dissenting opinion of Justice Frankfurter to the effect that a state may provide that the defense of insanity be specially pleaded "or that the issues be separately tried." The only other decision cited is *Troche v. California,* 280 U. S. 524, 50 S. Ct. 87, 75 L. ed. 592, in which this Court denied *certiorari,* to review the judgment of the Supreme Court of California in *People v. Troche,* 206 Cal. 35, 273 Pac. 767.

In the *Leland* case there was no bifurcated trial, and while the Oregon statute imposed a severe burden upon the accused, it did not create, as does the California statute, a **conclusive presumption.** As to the denial of *certiorari* by this Court in the *Troche* case, we need only say that under the recent decisions of this Court, a denial of *certiorari* means nothing at all, except that this Court declines to hear the matter.

Brown v. Allen, 97 L. ed. (Advance) 375, 73 S. Ct. 397, 403;

House v. Mayo, 324 U. S. 42, 65 S. Ct. 517, 89 L. ed. 739;

Hamilton Brown Shoe Co. v. Wolf Brown, 240 U. S. 251, 36 S. Ct. 269, 60 L. ed. 629;

Agoston v. Pennsylvania, 340 U. S. 844, 71 S. Ct. 9, 95 L. ed. 619.

As the question stands, therefore, it has never been decided by this Court.

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4. SUMMARY OF THE REASONS WHY THE CALIFORNIA STATUTES PROVIDING THE PROCEDURE WHERE INSANITY IS PLEADED ARE VIOLATIVE OF DUE PROCESS, AND ARE REPELLANT TO THE FUNDAMENTAL PRINCIPLES OF JUSTICE.

It is asserted by respondent that sections 1016 and 1026 of the California Penal Code, are but a departure in procedure and that "each issue must still be tried by a jury of 12 impartial persons".

We submit that it cannot be so tried.

This is the procedure: A jury is empanelled and sworn. They are instructed that they are to try only the issue raised by the plea of not guilty, and that they must conclusively presume that the defendant was sane. The evidence is produced. The judge again charges the jury that the defendant is conclusively presumed to have been sane at the time of the commission of the act. The jury brings in a verdict which makes it mandatory upon the trial judge to sentence him to death.

In the case at bar, the trial judge commended the jury for its verdict.*

He did this in a manner which precluded all possible chance of a fair trial of the insanity plea.

Then, after this death dealing verdict, the jury, in defiance of the most ancient and immemorial practice,

---

*"Immediately after the return of the verdict, the Court addressed the jury in the following language:

"The Court. Ladies and gentlemen of the jury, that is your verdict as recorded and as declared by the Clerk of this Court, is that right? (Jurors answer in affirmative.) Very well. Ladies and gentlemen of the jury, this has been a most unpleasant and a most difficult duty. You have discharged that duty conscientiously **and in my opinion, as the evidence in the case warranted.**

"You will not be discharged at this time; there has been entered in addition to the plea of 'not guilty' upon which the defendant has just been found guilty, the additional plea of 'not guilty by reason of insanity' and this jury—you ladies and gentlemen and alternates will pass upon that question.

"It has been necessary heretofore to take an adjournment on Thursday until Monday morning by reason of our law and motion day and that same situation obtains here now, we will reassemble here—reconvene here Monday morning at ten o'clock to hear the testimony relating to the plea—the second plea of the defendant to the second phase of the case, which is 'not guilty by reason of insanity'.

"During the adjournment I will admonish each and every one of you not to discuss the case amongst yourselves nor with anyone else, or permit anyone to discuss the same in your presence, and you are not to form or express any opinion, and the press is particularly admonished not to make inquiry of you concerning any phase of this case until the second phase has been finally disposed of.

"You will reconvene here Monday morning at ten o'clock, **and, of course, the second phase will not take of your time nearly as long as has been consumed in the trial of the first phase of the case.**

"Now, the Clerk has warrants for your jury fees and mileage as of this date and if you remain in your seats she will hand them out to you, and we will reconvene at ten o'clock next Monday morning. **That may be a sad blow to some of you, but it is necessary.** Thank you so much, and you are dismissed now until ten o'clock next Monday morning, and when we reconvene take the same seats as you now have. **Thank you.**"

is permitted to separate for a period of several days while they are free to discuss the former verdict with their family, friends, and neighbors, and with any one who sees fit to approach them on the subject.

In the case at bar, it was shown by uncontradicted evidence that one of the jurors did discuss the case in the interval between the two trials. When asked, "How did you arrive at a verdict that quickly?" she replied, "Well, we already knew it." When her interlocutor stated that the defendant was a sick man, the woman juror responded, "I am one of the jurors, I am sick too. I have hemorrhoids and I haven't killed anyone." (Clerk's Transcript 68.)

It is conceded by the Supreme Court of California that this flagrant misconduct of the juror was uncontradicted.

Yet that same jury, which, after rendering one verdict dooming a man to death, has been permitted to disperse, and go their several ways, is reassembled to go through what the trial judge in the remarks which we are printing in the margin clearly indicated was the farce of trying the insanity plea.

> "Is a juror who, after having heard the circumstances of the offense, and after having seen the defendant, and after having heard his testimony and decided that he is sane, in any condition of mind to be impartial when sitting in review upon his own act solemnly performed under oath and reported to the court? I submit that no juror, whatever his degree of mentality or whatever his degree of theoretical fairness, could impartially

rejudge the second issue. No human mind, with the elements we know to exist in it, could do so. That is why our statute (sec. 1073, subd. 2, Pen. Code) provides that a juror may be challenged 'for the existence of a state of mind' in reference to the case, 'which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party.' That is also the reason underlying section 1074 of the Penal Code (subd. 4), which provides that a citizen may not sit as a juror if he has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information; and subdivision 6 of the same section, which forbids a citizen to sit as a juror if he has been 'one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it.' Yet under the statutes under review it is permissible for the jury which has actually convicted the defendant, and in this case sentenced him to death, to sit again upon the issue of sanity.

"The contention is made that there is but one trial. If this is true, then why not dispose of both pleas at one hearing? Why seek to prejudice, shackle and intimidate the jury by calling them into court in the midst of their deliberations and have them deliver a verdict which prejudices the undetermined issue involved? It is no parallel to this situation to say that the pleas of former acquittal, former conviction or other special pleas may be heard separately and, therefore, the plea of insanity may also be heard

in like manner. This is untenable for the reason pointed out above, that insanity is a necessary ingredient of the plea of not guilty, whereas these special pleas rest upon their own separate foundations, and do not depend in any respect upon the plea of not guilty."

These are not our words. They are the language of a great and learned judge, Mr. Justice Preston, of the Supreme Court of the State of California, and a former Assistant Attorney General of the United States, in *People v. Troche, supra.*

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5. RESPONDENT MAKES NO SERIOUS ATTEMPT TO UPHOLD THE CONSTITUTIONALITY OF THE CALIFORNIA STATUTE PROVIDING THE MANNER OF THE INFLICTION OF THE DEATH PENALTY.

Somewhat naively at page 24 of respondent's brief the Attorney General of California states:

> "It is fundamental rule that one who strikes down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional and must show that the alleged unconstitutional feature injures him and so operates as to deprive him of rights protected by the Federal Constitution."

We respectfully submit that it would be difficult to show a clearer case of injury than a sentence of death.

We submit that a law which confers unconstitutional, arbitrary and illegal power upon an individual

cannot be sustained on the theory that the present occupant of the office will not abuse that power. Such a contention was recently struck down by this court where the head of the Executive Branch of the Government claimed the right to exercise arbitrary power.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 26 A.L.R. (2d) 1378, 96 L.ed. 1153.

We submit that the power to take life or the manner in which it shall be taken cannot be left to the discretion of any executive or administrative officer.

We submit that *Phyle v. Duffy,* 334 U.S. 431, 68 S.Ct. 1131, 92 L. ed. 1494, settles the question beyond all cavil.

CONCLUSION.

It is respectfully submitted that this man's life should not be taken when he was tried and convicted under a law denounced by a Justice of the Supreme Court of California as **"a step toward a return to the dark ages,"** further saying: "these provisions are so obnoxious to the spirit of our institutions that the blood of Abel 'crieth from the ground' for vindication."

People v. Troche, 206 Cal. 35 at page 62.

It is respectfully submitted that the petition for a *writ* of *certiorari* should be granted, and that upon the return thereto and the proceedings had in this

Court, the judgment of the Supreme Court of the State of California should be reversed.

Dated, San Francisco, California,
September 28, 1953.

EDWARD T. MANCUSO,
Member of the Bar of the Supreme Court of the United States,
MANCUSO, HERRON & WINN,
JOHN WYNNE HERRON,
Attorneys for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 214

JOSEPH A. DAUGHERTY,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITIONER'S PETITION FOR A REHEARING.

EDWARD T. MANCUSO,
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PETITIONER'S PETITION FOR A REHEARING.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pursuant to the provisions of Rule 33, Section 2, Subdivision (a) of the Revised Rules of the Supreme Court of the United States, the petitioner, under sentence of death, respectfully petitions for a rehearing of this cause. The grounds urged for a rehearing are as follows:

I.

INTERVENING CIRCUMSTANCES OF SUBSTANTIAL EFFECT.

Since the filing of the original petition, the personnel of the Court has changed. Mr. Chief Justice Warren did not participate in the order of this Court denying certiorari. This cause was tried in California and under the California law. Perhaps no member of the legal profession, certainly no other lawyer in public life, knows the criminal law of the State of California better, or has had more experience therein than the new and highly respected Chief Justice. For several terms he was District Attorney of Alameda County, the third most populous county in the State. He was thereafter Attorney General and represented the State of California in all criminal appeals. He is well acquainted with the questions presented in this cause, both in the State Supreme Court and in this Court. We submit that this Court should not dispense with the benefit of his special qualifications and we respectfully request that he take part in the deliberations on this petition for rehearing.

II.

OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED.

It is submitted that petitioner was deprived of due process of law when he was compelled to have the issue of his sanity tried by a juror who was not fair and impartial, and who had expressed an opinion as

to the merits of the case in the interval between the two trials, when the jurors were permitted to separate. We referred to this matter in petitioner's reply brief, Section IV, but did not set it forth as fully as we might have done. On the defendant's motion for a new trial the defendant produced the following affidavit which stands uncontradicted:

"Affidavit of Ansel D. Graham

Ansel D. Graham, being first duly sworn, deposes and says:

That he resides at 2730 Bartlett Street, Oakland, California;

That on May 26, 1952, affiant was in the corridor of the second floor of the Court House at Santa Rosa, California, between the hours of 10:30 and 11:30 A. M.;

That while affiant was in the corridor of said Court House at and about the hour of 11:00 A.M. he spoke to a woman who was standing near the main doorway of Department 1 of the Superior Court of the State of California, in and for the County of Sonoma, stating in the opening of a conversation with her as follows:

'What trial is going on in there?'

Said woman answered: 'It is the Daugherty trial.'

Affiant then said: 'It seems phony that they could get a verdict that quick on as large a trial as that.'

Said woman responded: 'Why?'

Affiant answered: 'Because he is a sick man.'

Said woman responded: 'I am one of the jurors, I'm sick too. I have hemorrhoids and I haven't killed anybody.'

Affiant then said: 'How did you arrive at a verdict that quickly?'

Said woman responded: 'Well, we already knew it,' and then walked away.

That affiant did not at any time enter the courtroom of Department 1 of said Court while the trial of the case of People v. Daugherty was in progress;

That said woman with whom affiant conversed was later identified by affiant as the juror, Mrs. Leda F. Mickelsen, who resides at Route 4, Box 199, Petaluma, California.

Dated: June 18, 1952." (Volume One of typewritten transcript, page 68.)

The statements attributed to the juror, and not denied by her, show conclusively that at a time when the trial of the defendant had not been completed and she was still under the duty not to discuss or to form or express any opinion concerning the case, she was not only disobeying the admonition of the Court but was expressing hostility to the defendant. According to her statement the jury had already arrived at their verdict before they were ever sent into the jury room.

If there were any conflict in the evidence as to the conduct of the juror, the decision of the trial judge on conflicting affidavits or testimony would be conclusive. But such is not the case. The only counter-showing is an affidavit filed by the juror herself which is notable,

not for what it says, but for what it does not say. Accordingly, we set forth her affidavit *in haec verba:*

"Leda F. Mickelsen, being first duly sworn, deposes and says:

"That she was a member of the trial jury in the case of the People of the State of California versus Joseph A. Daugherty, the same being a trial for murder, the said trial having commenced on April 28, 1952 and having concluded on June 5, 1952.

"That before being selected as a trial juror in said cause, and while being questioned in voir dire examination, affiant stated under oath that she had no fixed opinion regarding the merits of the case which would prevent her from trying the case solely upon the evidence adduced at the trial. That during the course of the said trial affiant frequently heard the admonition of the trial judge that the jurors should not form or express any opinion about the merits of the case until it was finally submitted to them, and affiant hereby states that she faithfully observed said admonition. That during the trial of the said case and before it was finally submitted to the jury affiant did not form or express any opinion about the merits of the case.

"That during the trial, before it was submitted, affiant did not, at any time, express any opinion regarding the merits of the case, nor did affiant overhear any other member of the jury state any such opinion." (C.T. 71.)

It will be noted that in her affidavit she does not deny that she made the statements related in the affi-

davit of Graham, and her failure to deny them constitutes an admission.

It must be borne in mind that she was still a member of the jury and that she still was impaneled and sworn to try the issues raised by the defendant's plea of "Not guilty by reason of insanity"; yet she expressed an opinion with reference to that plea when she said, "I am sick too; I have hemorrhoids and I haven't killed anybody."

It must be borne in mind that the experts and others who testified that in their opinion the defendant was insane, based their opinions in part upon appellant's long illness and his physical and mental condition resulting therefrom, and the effect thereof upon the defendant's mentality. The juror was clearly of the opinion that the illness of the defendant was not entitled to consideration because she herself had been sick.

It is clear that she entered upon the second phase of the trial with a mind biased and prejudiced against the defendant.

Misconduct of that character in which a juror concealed bias and prejudice has been held by the Supreme Court of the State of California to be ground for reversal of a judgment in which the death penalty was imposed.

People v. Galloway, 202 Cal. 81, 259 Pac. 332.

The Court cites, *inter alia:*

Wharton, Criminal Pleading and Practice, Ninth Edition, page 605, Section 844;

State v. Mott, 29 Montana 292, 74 Pac. 728;
State v. Morgan, 23 Utah 212, 64 Pac. 356.

We referred to this episode of the juror in our reply brief for the purpose of illustrating the utter unfairness and injustice of the bifurcated trial. We now contend that the trial of petitioner before a jury containing such a juror constitutes a deprivation of due process of law. The Sixth Amendment to the Constitution of the United States provides that, "the accused shall enjoy the right to a speedy and public trial by an **impartial** jury." The retention of a disqualified or prejudiced juror constitutes prejudicial error.

Lett v. United States, 15 Fed. (2d) 690.

> "A juror, to be impartial must, to use the language of Lord Coke, 'be indifferent as he stands unsworn.'"
>
> *Reynolds v. United States,* 98 U.S. 146, 25 L. Ed. 244;
>
> *People v. Lashkowitz,* 3 N.Y.S. (2d) 98.

This amendment guaranteeing the right to a trial by an impartial jury is in accordance with the fundamental rights of Englishmen guaranteed by the Magna Charta which provides that no freeman shall be imprisoned or put to death *nisi per legale judicium parium suorum vel per legem terrae* (save by the lawful judgment of his peers and the law of the land).

See also the opinion of Mr. Justice Black in *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

It is submitted that petitioner was not only tried under a law that denies him due process, but that he was denied due process by the procedure in the lower Court under that law. A trial by a prejudiced jury is not a trial at all. It is naught but a judicial lynching.

This ground is now urged although not previously presented. See *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 59 S. Ct. 8, 83 L. Ed. 34, cited by this Court in Rule 33.

CONCLUSION.

Wherefore your petitioner prays your honors for an order granting a rehearing of his petition in the above entitled cause, and that upon such rehearing his petition for a writ of certiorari be granted and the judgment of the Supreme Court of the State of California reversed.

Dated, San Francisco, California,
October 19, 1953.

EDWARD T. MANCUSO,
Member of the Bar of the Supreme Court of the United States,
MANCUSO, HERRON & WINN,
JOHN WYNNE HERRON,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the counsel for the petitioner in this cause; that the foregoing petition for a rehearing is presented in good faith and not for delay, and I also certify that the petition is restricted to the grounds therein set forth which are the same grounds specified in Section 2 of Rule 33 of the Revised Rules of the Supreme Court of the United States.

Dated, San Francisco, California,
October 19, 1953.

EDWARD T. MANCUSO,
Member of the Bar of the Supreme Court of the United States,
Of Counsel for Petitioner.